

American Worker Project:
Securing the Future of America's Working Families

Government in the Workplace

FRUSTRATIONS WITH WORKPLACE LAW

Introduction

In addition to its case studies of the high-tech and garment industries, the American Worker Project researched the effects of workplace law in other contexts. Does existing legislation help or hinder this country's efforts to meet the challenges of the 21st century?

GAO Study

The Project reviewed a report by the General Accounting Office of the United States (GAO). On September 30, 1998, GAO submitted a study to the House of Representatives at the request of Chairman Pete Hoekstra of the Oversight and Investigations Subcommittee of the Committee on Education and the Workforce.¹ The GAO report focused on the federal and state laws that apply to California businesses in the high technology electronics and aerospace industries. GAO specifically sought information concerning the requirements of federal and state laws affecting the workplace, taxation, and environmental safeguards in California manufacturing firms with varying numbers of employees.

To identify the legal requirements, GAO discussed applicable laws and regulations with state and federal agency officials. In these discussions, the officials commented on their efforts to help businesses identify and meet their legal responsibilities. These sources include Web sites, guides, seminars and training. No one public agency, however, coordinates or produces a complete resource guide identifying all legal requirements that apply to California manufacturers.

GAO found that the businesses it reviewed must comply with at least 35 federal and 33 labor-related and business-related state laws.

Although a number of these laws take effect as firms grow in size, the majority apply regardless of the number of employees. The requirements of federal and state laws vary, with California law usually setting more comprehensive standards. Some of the laws contradict each other further creating an environment of confusion, both time-consuming and expensive. Despite the help offered by government agencies, the seven companies studied in the report relied on outside resources to ensure compliance with the law. These businesses chose not to use government agencies for help because they said that they did not know which bureaucracy to contact or whether they could trust the information they received. In fact, just at the federal level, the applicable laws are administered by various entities including the Department of Labor, the Equal Employment Opportunity Commission, the National Labor Relations Board, the Internal Revenue Service, or the Environmental Protection Agency.

Managers overseeing human resource operations at the seven California manufacturing firms implemented a variety of approaches to meet their regulatory obligations, with many using outside resources such as health and safety consultants, payroll services, and lawyers. They sought these outside resources to help them comply with both complex issues, such as pension plan requirements, and routine duties, such as payroll deductions. These companies developed strategies to comply with the law because each was concerned that certain requirements involved excessive complexity, paperwork, or cost. Managers expressed frustration because they could never be sure they were in complete compliance with all applicable requirements. They feared an unknown requirement that could lead to a fine or increase their liability for potential litigation. In contrast to these criticisms, the managers cited areas in which they believed regulations helped to improve the workplace, such as health and safety or workers' compensation requirements.

Employers and office managers claim frustration with never being sure they are in compliance because all of the mentioned agencies have ever-changing laws that employers must follow. Their concerns include perceptions of high regulatory costs for unclear demands made by agencies that focus on enforcement rather than service. Clearly, compliance with these confusing laws is both time-consuming and expensive for businesses in California. In a time of growing competition and globalization, how can these businesses afford to struggle with 68 confusing laws?

Teamwork

One practice in today's innovative workplace is the use of employee-management teams. As Cliff Jernigan observes in his book *High Tech Survival*, such teams are necessary to the operation of non-union businesses. They boost productivity, quality, and efficiency by facilitating cooperation rather than artificially constrained competition between workers and managers.²

Samuel Estricher, Professor of Labor and Employment Law at New York University, testified before Congress regarding workplace teams. "Employee Involvement programs, which operate successfully in both unionized and nonunionized settings, have been established by more than 80 percent of the largest employers in the United States and exist in an estimated 30,000 workplaces."³ Yet many of the practices required to be successful in this "participatory" workplace, including quality circles, self-managed work teams, joint labor-management teams, and problem-solving teams, potentially are subject to challenge in nonunion shops by Great Depression-era provisions of the National Labor Relations Act (NLRA). Nonunion employers utilizing such programs run the risk of being faced with unfair labor practice charges for illegal domination. The apparent mismatch between NLRA provisions that limit worker choices and the reality of the needs of today's nonunion workers presents a workplace dilemma.

In particular, Section 8(a)(2) of the National Labor Relations Act prohibits direct discussions between workers and management with respect to terms and conditions of employment:⁴ Section 2(5) defines "labor organization" as:

Any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part of dealing with employers concerning grievances, labor disputes, wages rates of pay, hours of employment, or conditions of work.⁵

A number of today's employee involvement committees appear to fall within the current version of the Act. With the ever-present possibility of American companies being brought before the National Labor Relations Board on charges of unfair labor practices, Section 8(a)(2) continues to have a chilling effect on eighty-six percent of America's workers who are not members of labor unions.⁶

The aim of Section 8(a)(2) was to prohibit companies from forming "sham" unions.⁷ But it has led to the unintended consequence of National Labor Relations Board determinations that good-faith labor-management cooperative efforts constitute unfair labor practices. Even a former Member of the National Labor Relations Board, Charles I. Cohen, recognizes that:

[I]n our zealous effort to prohibit company unions, we have created obstacles to common sense dealings between employees and management. America's companies and America's workers need the flexibility to communicate freely with each other in groups, through employee participation committees, as foreign companies have long been able to do, to develop workplace innovations that enhance the companies which, in turn, lead to job growth and higher wages.⁸

While employee committees should neither be used as a substitute for independent unions nor inhibit workers from engaging in collective bargaining, Section 8(a)(2) presents significant barriers when union representation is not an issue. The National Labor Relations Board has determined as illegal various teamwork programs in non-union settings. Such holdings by the Board strongly suggest that the current law needs to be modified to permit cooperative interaction between America's companies and workers to improve job safety, performance, and satisfaction.

Such changes could be made to the NLRA while preserving the goal of not permitting employer-dominated company unions. As Professor Estreicher testified:

[I]t is doubtful that permitting employers to institute committees for bilateral discussions over matters of mutual concern, including pay and working conditions, would have the effect of preventing employees from making an uncoerced decision over whether they wish to be represented by an independent union.⁹

The concept of employee involvement programs has gained increasing support in recent years from a variety of sources. The 1993 Commission on the Future of Worker-Management Relations (popularly known as the Dunlop Commission) appointed by President Clinton examined the issue of teaming when it considered "[w]hat (if any) new methods or institutions should be encouraged, or required, to enhance work-place productivity through labor-management cooperation and employee participation."¹⁰

After months of research and hearings, the Dunlop Commission determined that the need for broadened employee participation and cooperation in workplace decision making should be a goal for the twenty-first century workplace.¹¹ The Commission's report stated that:

[e]mployee participation and labor-management partnerships are essential to improved productivity, enhanced quality and economic performance, and an increased voice and higher living standards for American workers. It is in the national interest to see participation and partnerships sustained and expanded to cover a larger proportion of the American workforce and workplaces, and to address the full range of issues critical to improving workplace performance and advancing workers' economic positions and quality of working lives.¹²

While the Dunlop Commission Report did not offer specific statutory changes to permit employee involvement programs,¹³ the report did find that "some clarification of Section 8(a)(2) so that employee involvement programs -- such as those relating to production, quality, safety and health, training or voluntary dispute resolution -- are legal as long as they do not allow for a rebirth of the company unions the section was designed to outlaw."¹⁴

The 104th Congress passed the Teamwork for Employees and Managers Act of 1995,¹⁵ which would have "reasonably adapt[ed] the NLRA to the rigors of a supply-side, global economy."¹⁶ "Despite the fact that his Secretary of Labor, Robert Reich ha[d] often expressed support for greater workplace cooperation, due to the opposition of organized labor,"¹⁷ President Clinton vetoed the legislation on July 30, 1996.¹⁸ Clinton stated:

[T]his legislation, rather than promoting genuine team work, would undermine the system of collective bargaining that has served this country so well for many decades. It would do this by allowing employers to establish company unions where no union currently exists and permitting company-dominated unions where employees are in the process of determining whether to be represented by a union.¹⁹

During the 105th Congress similar legislation to amend the NLRA was also unsuccessful.

The American Worker at a Crossroads Project also found compelling evidence for statutory changes that will foster rather than impede the fundamental changes that are sweeping the workplace. These changes, like the Team Act, are needed so that America can have both a modern and adaptive economy and a workplace that allows employees to reach their full potential. In discussions held around the country and in Washington, DC, the American Worker Project frequently heard requests for a legislative change to the NLRA to foster teaming. These came from employees in a variety of industries, from information technology, such as Intel and IBM, to manufacturing companies, such as Lockheed-Martin.²⁰

For example, at the IBM Sales Center in Atlanta, Georgia, teaming is being used to empower employees to structure the workplace to best meet their needs. The Center's layout is designed in a system of employee workgroup pods, with one manager in a cubicle in the middle of fifteen employees, to facilitate working together as a team. Through this team-development workplace structure, the management component at the center has been reduced from fifteen percent to single digits.²¹ At Lockheed-Martin, workers and management design aircraft together. Joint design teams empower all involved, increase efficiency, and eliminate waste.²²

Findings and Recommendations

Workers and managers cannot be adversaries in a successful business enterprise. Indeed, there is no more compelling mutual interest than the common goal of pursuing the success of the business endeavors in which they are joined. "A team is . . . a vehicle for individual fulfillment and success, providing each team member with power, energy, and strength for achieving personal potential."²³ Policy-makers must act to support innovative and evolving practices of the 21st century workplace.

- Congress must pass legislation to safeguard those employers who find that compliance with one law places them in violation of another. Congress as well as state governments and federal agencies must work to eliminate conflicts and contradictions in workplace law.
- Congress should help America's workers succeed in the 21st Century workplace by modifying the NLRA to authorize workplace teams.
- Federal and state governments should develop a process to streamline laws and reduce regulatory costs.

¹ BUSINESS REGULATION: CALIFORNIA MANUFACTURERS USE MULTIPLE STRATEGIES TO COMPLY WITH LAWS (GAO/B-278100, September 30, 1998).

² Cliff Jernigan, HIGH TECH SURVIVAL 109 (Olive Hill Lane Press 1996).

³ H. R. 634, 105th Cong., 1st Sess. (1997); Bill Summary, S. 295 RS, 105th Cong., 1st Sess. (1997).

⁴ National Labor Relations Act, 29 U.S.C. §158(a)(2) (1935).

⁵ National Labor Relations Act, 29 U.S.C. § 152(5) (1935)

⁶ U.S. Department of Labor, Press Release, *Union Members in 1997*, January 30, 1998.

⁷ Samuel Estreicher, Professor of Labor and Employment Law, New York University, *Congressional Testimony before the Senate Committee on Labor and Human Resources, Hearing on Meeting the TEAM Act*, 105th Cong., 1st Sess. (February 12, 1997).

⁸ Charles I. Cohen, Former Member of the National Labor Relations Board, *Congressional Testimony before the Senate Committee on Labor and Human Resources, Hearing on Meeting the TEAM Act*, 105th Cong., 1st Sess. (February 12, 1997).

⁹ Id.

¹⁰ Commission on the Future of Worker-Management Relations, *Report and Recommendations*, 103rd Cong., 2nd Sess. (1994) x.

¹¹ Id. x, xxii.

¹² Id. p. 4.

¹³ Id.

¹⁴ Id. p. 7.

¹⁵ H. R. 743, 104th Cong., 1st Sess. (1995); S. 295, 104th Cong., 1st Sess. (1996).

¹⁶ Michael H. Leroy, *Professor at the Institute of Labor and Industrial Relations, University of Illinois at Urbana-Champaign, Congressional Testimony before the Senate Committee on Labor and Human Resources, Hearing on Meeting the TEAM Act*, 105th Cong., 2nd Sess. (February 12, 1997).

¹⁷ Robert B. Fitzpatrick, *Employment Discrimination and Civil Rights Actions in Federal and State Courts*, SB56 ALI-ABA 227, 244 (May 1, 1997).

¹⁸ Veto of H.R. 743, H. Doc. No. 251, 104th Cong., 2nd Sess. 1 (1996).

¹⁹ *Id.*

²⁰ *Committee on Education and the Workforce, Subcommittee on Oversight and Investigations, American Worker Project Roundtable, IBM*, January 20, 1998.

²¹ *Committee on Education and the Workforce, Subcommittee on Oversight and Investigations, American Worker Project Roundtable, Lockheed-Martin*, January 20, 1998.

²² Ronald G. Kingen, *President-Elect, ASQC, Congressional Testimony before the House Committee on Education and the Workforce, Subcommittee on Employer/Employee Relations, Field Hearing in Oak Brook, Illinois on the Teamwork for Employees and Managers (TEAM) Act of 1997*.

²³ Samuel Estreicher, *Professor of Labor and Employment Law, New York University, Congressional Testimony before the Senate Committee on Labor and Human Resources, Hearing on Meeting the TEAM Act*, 105th Cong., 1st Sess. (February 12, 1997).